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HONORABLE JOHN C. COUGHENOUR

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION,)	
NORTHWEST COALITION FOR	)	Civ. No. C01-0132C
ALTERNATIVES TO PESTICIDES,)	
PACIFIC COAST FEDERATION OF)	
FISHERMEN'S ASSOCIATIONS, and	)	MOTION FOR CLARIFICATION THAT
INSTITUTE FOR FISHERIES RESOURCES,	)	THE JANUARY 22, 2004 ORDER'S
	)	NOXIOUS WEED EXCLUSION DOES
Plaintiffs,	)	NOT AUTHORIZE APPLICATION OF THE
	)	COVERED PESTICIDES DIRECTLY INTO
v.	)	SALMON SUPPORTING WATERS
)	
ENVIRONMENTAL PROTECTION	)	NOTED ON MOTION CALENDAR PER
AGENCY, and MICHAEL O. LEAVITT,	)	LOCAL RULE 7: JULY 30, 2004
ADMINISTRATOR,)	
	)	EXPEDITED TREATMENT REQUESTED
Defendants,	)	DUE TO IMMINENCE OF SPRAYING
)	
AMERICAN CROP PROTECTION)	
ASSOCIATION, et al.,)	
)	
Intervenor-Defendants.)	

MOTION FOR CLARIFICATION THAT THE JANUARY 22, 2004
ORDER'S NOXIOUS WEED EXCLUSION DOES NOT
AUTHORIZE APPLICATION OF THE COVERED PESTICIDES
DIRECTLY INTO SALMON SUPPORTING WATERS (C01-0132C) - 1 -

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1 Plaintiffs Washington Toxics Coalition et al. ("Coalition") hereby ask the Court to clarify
2 whether any of the pesticide active ingredients subject to the Court's January 22, 2004 Order can
3 be applied directly into salmon supporting waters. Specifically, the Washington Department of
4 Ecology has interpreted the Court's order to allow applications of 2,4-D directly into salmon
5 supporting waters, including Lake Washington and the Columbia River, under the Order's
6 exclusion for noxious weed programs. Applications of 2,4-D into salmon supporting waters may
7 begin as early as July 16, 2004 under a permit issued by the Washington Department of Ecology.
8 Accordingly, the Coalition asks the Court to clarify the meaning of the Order as soon as
9 practicable.

10 BACKGROUND

11 I. THE PERTINENT PROVISIONS OF THE JANUARY 22, 2004 ORDER

12 This Court's January 22, 2004 Order enjoins, vacates, and sets aside the Environmental
13 Protection Agency's ("EPA's") authorization of ground applications of any covered pesticide
14 within 20-yards of salmon supporting waters, subject to certain exceptions. Order III.A.1. One
15 such exception extends to "Use of the Pesticides for control of state-designated noxious weeds as
16 administered by public entities, when such control program implements the following safeguards
17 that NMFS routinely requires for such programs." Order III.D.2. The noxious weed exclusion
18 then lists smaller buffers than set out in the Order's general buffer provision, Order III.A.1. For
19 example, aerial applications cannot occur within 100 yards of salmon supporting waters, and
20 chemical spraying cannot occur within 15 yards of salmon supporting waters. Order III.D.2.a, c.
21 The exclusion also provides: "Only those Pesticides registered by EPA under the Federal
22 Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136(y), for aquatic
23 application can be used within 15 feet of Salmon Supporting Waters." Order III.D.2.d.

1 II. THE ORIGIN OF THE NOXIOUS WEED EXCLUSION'S SAFEGUARDS

2 The issue presented for clarification is whether pesticides registered for aquatic use by
3 EPA can be applied directly to salmon supporting waters under the noxious weed exclusion. As
4 indicated in the noxious weed exclusion, the specified safeguards were drawn from NMFS'
5 authorization of noxious weed control programs. Order III.D.2; see also Plaintiffs' Notice of
6 Filing Proposed Order at 5 (Oct. 2, 2003) (Dkt. 200). NMFS' authorization is contained in
7 biological opinions issued at the conclusion of Endangered Species Act ("ESA") Section 7
8 consultations. Id. At the time the parties submitted their proposed orders, NMFS had issued
9 four such biological opinions for noxious weed spraying programs on Forest Service or Bureau
10 of Land Management lands:

11 http://www.nwr.noaa.gov/1publcat/bo/2002/200201273_travis_tyrrell_12-18-2002.pdf

12 http://www.nwr.noaa.gov/1publcat/bo/2002/200200473_noxious_weed_2002_10-18-2002.pdf

13 http://www.nwr.noaa.gov/1publcat/bo/2002/200200390_2002_herbicide_09-16-2002.pdf

14 http://www.nwr.noaa.gov/1publcat/bo/2003/200101363_fs_noxious_08-18-2003.pdf

15 These biological opinions specify the type of pesticide application that is permitted in various
16 buffer areas. Thus, broadcast spraying cannot occur within 100 feet of open water. Of particular
17 relevance to this motion, the only types of applications allowed within 15 feet of water are: "spot
18 spraying, wicking, dipping, painting, and injecting." See

19 http://www.nwr.noaa.gov/1publcat/bo/2003/200101363_fs_noxious_08-18-2003.pdf, at 5.

20 III. THE AQUATIC APPLICATION OF COVERED PESTICIDES PRECIPITATING THE
21 REQUEST FOR CLARIFICATION

22 The Washington Department of Ecology has issued a water discharge permit to the
23 Washington Department of Agriculture, authorizing aquatic applications of certain pesticides for
24 noxious weed control. See

1 http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/noxious/noxiouspermit
2 [mayfinal.pdf](#). The permit is a National Pollutant Discharge Elimination System (“NPDES”)
3 permit issued under the federal Clean Water Act. Individuals can apply for coverage under the
4 general permit. See
5 http://apps.ecy.wa.gov/AquaticPestApp/NoxWeed_GenInfo.asp?AppCat_CD=N. Several
6 pesticides may be sprayed directly into surface waters under this permit, including 2,4-D, one of
7 the pesticides at issue in this case and subject to the buffers set out in the Court’s January 22,
8 2004 Order.

9 After this Court issued its January 22, 2004 Order, the Department of Ecology sought
10 legal guidance concerning the impact of that Order on the Department’s aquatic pesticide
11 spraying permit. In May 2004, an Assistant Attorney General advised the Department that the
12 noxious weed exemption authorized applications of the covered pesticides directly to water for
13 noxious weed control if EPA had previously registered the pesticide for aquatic use. The
14 Assistant Attorney General also advised that use of a pesticide by a private individual under the
15 permit issued by the Department of Ecology to the Department of Agriculture qualified as a
16 program “administered by a public entity” within the meaning of the noxious weed exclusion.
17 Exhibit A.

18 By letter dated May 21, 2004, attorneys for the Coalition urged the Assistant Attorney
19 General to reconsider his legal interpretation of the Order based on the purpose of the buffers and
20 the origins and basis for the noxious weed exclusion. Exhibit B. Attorneys for the Coalition sent
21 a copy of their letter to EPA’s counsel in this litigation. By letter dated July 1, 2004, attorneys
22 for the Coalition asked EPA to intervene and direct the Department of Ecology to rescind the
23 permit. Exhibit C. On July 12, 2004, the Coalition and its attorneys discussed this matter with
24

1 the Department of Ecology and the Assistant Attorney General, who indicated that the
2 Department would rescind the permit if EPA interpreted the Order to prohibit direct aquatic
3 applications of the covered pesticides or if this Court clarified that the Order prohibits direct
4 applications of the covered pesticides into salmon supporting waters. On July 13, 2004, EPA's
5 counsel indicated that EPA would take no position on this matter and that it had no authority
6 with respect to this permit.¹

7 THE REQUESTED CLARIFICATION

8 The Coalition asks the Court to clarify that the noxious weed exclusion contained in the
9 January 22, 2004 Order does not authorize application of any of the covered pesticides directly
10 into salmon supporting waters. Such an interpretation is consistent with the purpose and overall
11 structure of the Order, as well as with the origins of the safeguards incorporated into the noxious
12 weed exclusion.

13 First, the Court's January 22, 2004 Order enjoins, vacates, and sets aside, EPA's
14 authorization of the covered pesticides within designated buffer areas. The buffers are defined as
15 specified distances "of any Salmon Supporting Waters." While the Order never expressly
16 prohibited direct application of any of the pesticides into salmon supporting waters, its intent it to
17 prevent the migration of the covered pesticides into "water bodies where salmon are ordinarily
18 found at some time of the year." Order II. If the Washington Assistant Attorney General's
19 interpretation were correct, it could be extended to allow application of any of the covered
20 pesticides directly into salmon supporting waters since the Order contains no express prohibition
21 on such aquatic applications.

22 ¹ This latter assertion appears to be in error since EPA has the authority to object to issuance of
23 an NPDES permit and such an objection keeps the permit from going into effect. 33 U.S.C.
24 § 1342(d)(2).

1 Second, the noxious weed exclusion's safeguards were drawn from NMFS' biological
2 opinions authorizing noxious weed spraying on public lands. Plaintiffs' Notice of Filing
3 Proposed Order at 5 (Oct. 2, 2003) (Dkt. 200). To the extent that NMFS approved applications
4 within 15 feet of open water, it limited such applications to spot treatments, wicking, dipping,
5 painting, and injections. The programs reviewed in the NMFS biological opinions did not
6 involve applications of pesticides directly into surface waters.

7 Third, the entire focus of the Coalition's briefing and expert witness submissions seeking
8 buffer zones substantiated the role of buffers to minimize the extent to which the pesticides
9 would runoff and drift into salmon waters. That none of the parties addressed applications
10 directly into salmon waters is unsurprising in this context. The Coalition never envisioned the
11 applications would be permitted directly into salmon waters when the entire purpose of the
12 buffers was to prevent migration of the pesticides into those same waters.²

13 CONCLUSION

14 For these reasons, the Coalition asks the Court to clarify that the noxious weed exclusion
15 does not authorize applications of any of the covered pesticides directly into salmon supporting
16
17
18

19 ² In addition, the noxious weed exclusion is limited to control programs administered by public
20 entities. This same language applies to public health vector control programs and was designed
21 to ensure that public entities could apply pesticides for public health purposes through
22 contractors, rather than only by using public employees for the applications. While EPA had
23 proposed excluding all programs "administered by or under the direction of a public entity," this
24 Court rejected that language and instead adopted the language proposed by the Coalition.
Transcript of Dec. 9, 2003 Status Conference at 8; EPA's Proposed Order at 5 (Dkt. 207). While
the Washington Department of Agriculture has obtained a water discharge permit for noxious
weed control, individuals who seek to apply pesticides into water are neither agents nor under the
control of the Department. Accordingly, their activities do not appear to be part of a noxious
weed control program administered by a public entity.

1 waters.

2 Respectfully submitted this 15th day of July, 2004.

3
4 /s/ Patti Goldman

5 PATTI GOLDMAN (WSB #24426)

6 AMY WILLIAMS-DERRY (WSB #28711)

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14 *Attorneys for Plaintiffs*

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24 MOTION FOR CLARIFICATION THAT THE JANUARY 22, 2004

25 ORDER'S NOXIOUS WEED EXCLUSION DOES NOT

26 AUTHORIZE APPLICATION OF THE COVERED PESTICIDES

DIRECTLY INTO SALMON SUPPORTING WATERS (C01-0132C) - 7 -

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EXHIBIT A

Catherine Hamborg

Subject: RE: FW: legal opinion re Aquatic Application of 2,4-D

-----Original Message-----

From: Erika Schreder [mailto:eschreder@watoxics.org]

Sent: Thursday, May 20, 2004 4:04 PM

To: Patti Goldman

Subject: Fwd: FW: legal opinion re Aquatic Application of 2,4-D

From: "Hamel, Kathy" <kham461@ECY.WA.GOV>
To: Erika Schreder <eschreder@watoxics.org>
Subject: FW: legal opinion re Aquatic Application of 2,4-D
Date: Thu, 20 May 2004 15:55:00 -0700

Hi Erika, According to Kathleen Emmett, I can go ahead and send these to you. This is the entire string of e-mails so you need to start at the bottom and read up.

Kathy

-----Original Message-----

From: Lavigne, Ronald (ATG)

Sent: Wednesday, May 12, 2004 2:48 PM

To: Emmett, Kathleen

Cc: Hamel, Kathy

Subject: RE: legal opinion re Aquatic Application of 2,4-D

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Kathy,

In response to Kathy Hamel's two additional questions.

1) The injunction excludes the use of pesticides for control of state-designated noxious weeds "as administered by public entities[.]" This exclusion does not appear to require that the pesticide application be done by a public entity, but only requires

that the application be "administered" by a public entity. Since Agriculture holds the NPDES permit for noxious weeds, a public entity is administering the application of pesticides even if the actual application is done by a private entity at the request of private lake owners. Consequently, so long as the application of pesticides is done to control state-designated noxious weeds, all three of the examples in Kathy's e-mail below would be consistent with the injunction.

2) I'm not sure what Kathy means by the statement "the amine formulation of 2,4-D is registered for aquatic use in Washington." Pursuant to the injunction, only those chemicals registered by EPA under FIFRA for aquatic application can be used within 15 feet of Salmon Supporting Waters. If EPA has registered the amine formation of 2,4-D under FIFRA for aquatic use in Washington, then the amine formation of 2,4-D may be applied directly into water. However, if some entity other than EPA has registered the amine formation of 2,4-D for aquatic use in Washington, or if EPA's registration was not done pursuant to FIFRA, then the amine formation of 2,4-D cannot be lawfully applied directly into waters.

Hope this helps.

ron

-----Original Message-----

From: Emmett, Kathleen

Sent: Wednesday, May 05, 2004 1:13 PM

To: Lavigne, Ronald (ATG)

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi Ron, I hope you're getting out and enjoying this beautiful spring.

Thank you for your opinion on this pesticide/buffer matter. Kathy Hamel in my program had some additional questions (see below) about the use of 2,4-D in areas restricted by Judge Coughenour. Basically she wants to know

1) if applicators who contract with WSDA to treat noxious weeds under their permit coverage are considered agents of WSDA. And

2) does the exemption for treatment of noxious weeds apply to aquatic weeds that are treated in waters, such as Lake Washington.

Thanks, Kathleen

-----Original Message-----

From: Hamel, Kathy

Sent: Tuesday, May 04, 2004 4:20 PM

To: Emmett, Kathleen

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi, Here is the e-mail that I sent to Ron on the 22nd.

We really need to get a decision on this ASAP since

applications are being held. If you can speed Ron up, I would really appreciate it. By the way, Bridget Moran does think that private applicators operating under the NPDES permit for noxious weeds can use the amine formulation of 2,4-D for milfoil control.

Kathy

-----Original Message-----

From: Hamel, Kathy

Sent: Thursday, April 22, 2004 11:39 AM

To: Lavigne, Ronald (ATG)

Cc: Peeler, Dave; Carley, Steve; Gildersleeve, Melissa; Emmett, Kathleen

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi Ron, Thank you very much for your legal opinion of the Court's injunction order for 2,4-D use. We still have a couple of points that we would like you to clarify for Ecology's Pesticide Working Group.

1. What constitutes a public entity? As you are aware, Agriculture holds the NPDES permit for noxious weeds. Everybody who applies herbicides to water for the control of noxious weeds acquires coverage as a "contractor" to Agriculture under this permit. Does that mean that private applicators who are hired by private lake residents for 2,4-D treatment may be considered public entities because they have coverage for that activity under Agriculture's permit? Or does it mean that if King County, for instance, hired a private applicator to treat water milfoil on a lake, that this treatment would be considered to be by a public entity. The third alternative would be if a staff person from King County treated the lake under Agriculture's permit. This third alternative seems to me to be very clear that a public entity is applying the herbicide. The other alternatives are less clear. Could you please let us know if all of these alternatives apply to this ruling or if not, which ones do not apply.

2. The amine formulation of 2,4-D is registered for aquatic use

in Washington. However, the exemptions that are set out for its use for noxious weed control, all seem to pertain to a terrestrial application that may get into the water. Does this exemption also apply to applications of the amine formulation of 2,4-D that are applied directly into the water such as for the control of Eurasian watermilfoil? Based on the ESU maps posted by Agriculture, it appears that Lake Washington and Lake Sammamish are the only lakes that might be affected by this ruling. although there might be a possible 2,4-D treatment in a slough in the Columbia River.

We would appreciate a quick response since Agriculture is already receiving applications from private applicators for treatments on Lake Washington. Agriculture has been instructed to not issue coverage for 2,4-D use until these questions are resolved.

Thank you very much.

Kathy Hamel

Aquatic Plant Specialist

407-6562

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Kathy,
Sorry for my lengthy delay in getting back to you.
Except as discussed below, Ecology should not continue to allow the aquatic application of 2,4-D, or any of the other pesticides that are identified in the Court's injunction order.

The injunction prohibits the ground application of a listed pesticide within 20 yards of a "salmon supporting stream" and prohibits the aerial application of a listed

pesticide within 100 yards of a "salmon supporting stream." Allowing someone to apply one of the listed pesticides directly to water would violate the court's injunction, since such an application would not comply with either the 20 or 100 yard buffer zone required by the injunction. Consequently, Ecology cannot authorize the application of a listed pesticide unless the application complies with the 20 and 100 yard buffers. This effectively prohibits most aquatic applications of the listed pesticides.

Pursuant to paragraph III.D.2.g of the injunction (pp 9-10), Ecology may authorize the use of the amine formulation of 2,4-D by public entities to control state designated noxious weeds within the 20 and 100 yard buffers that would otherwise apply. If the amine formulation of 2,4-D has been registered by EPA under FIFRA for aquatic application, it can be applied directly to water by a public entity for control of state-designated noxious weeds. Order at paragraph III.D.2.d. If the amine formulation has not been registered by EPA under FIFRA for aquatic application it cannot be applied within 15 feet of salmon supporting waters. Please note that paragraph III.D.2 includes several restrictions that must be observed if the use of the amine formulation of 2,4-D is going to be authorized pursuant to this paragraph of the order. If these restrictions are not included in the noxious weed permit, the permit will need to be modified to include the missing restrictions before the use of the amine formulation of 2,4-D can be authorized by Ecology. Also please note that under paragraph III.D.2 of the order, the amine formulation of 2,4-D can only be used by public entities to control state-designated noxious weeds. If a different formulation of 2,4-D is used, or if the amine formulation is applied by a non-public entity or is applied to control something other than a state-designated noxious weed, than the application will be subject to the 20 and 100 yard buffers discussed above.

I hope this helps. Please don't hesitate to give me a call if you'd like to discuss this further. I'm also happy to meet with you to discuss my opinion if that would be helpful.

ron

-----Original Message-----

From: Emmett, Kathleen

Sent: Tuesday, January 27, 2004 7:29 AM

To: Lavigne, Ronald (ATG)

Cc: Wallace, Dick; Hamel, Kathy; Carley, Steve; Peeler, Dave

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi Ron, We need some legal guidance with respect to a ruling by Judge John Coughenour (Seattle DC). He has restricted the use of 38 pesticides near salmon streams, one of which we permit for use under 2 of our NPDES permits. Should we continue to allow the use of 2,4-D? Does this ruling affect the legal coverage provided by our permits?

I've attached the pdfs of our permits, a news release regarding the ruling and a copy of the court order. An email from Kathy Hamel is also attached below.

The spray season starts up in late March early April so it would be wonderful if we could have some guidance on this matter before then. Thanks for your help with this Ron, Kathleen

federal district court Judge John Coughenour has restricted the use of 38 pesticides near salmon streams

• http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/n
http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/n
---[http://www.earthjustice.org/news/display.html?](http://www.earthjustice.org/news/display.html?ID=767-Original)
[ID=767-Original](http://www.earthjustice.org/news/documents/1-04/Order_1-22-04.pdf)
http://www.earthjustice.org/news/documents/1-04/Order_1-22-04.pdf

Message-----

From: Hamel, Kathy
Sent: Monday, January 26, 2004 3:27 PM
To: Emmett, Kathleen
Cc: Carley, Steve
Subject: Aquatic Application of 2,4-D

Hello,

There are two formulations of 2,4-D that currently are labeled for aquatic use. Ecology allows their use under the NPDES permits for Noxious Weed Control and Nuisance Weed and Algae control. Most of the 2,4-D use under these permits has been for the control of the state-listed noxious weed, Eurasian watermilfoil. 2,4-D is a very selective chemical and very few other aquatic plants are affected by

it at the rates that are allowed. 2,4-D use is subject to Fish and Wildlife timing table restrictions for salmon. Here is the salmon mitigation language used in the noxious weed permit:

The local habitat and/or fish biologist from the Washington State Department of Fish and Wildlife shall be notified at least fourteen days before 2,4-D is applied to salmonid-bearing waters. 2,4-D shall not be applied to a waterbody when, in the

written opinion of the habitat and/or fish biologist, juvenile salmonids would be adversely impacted. The notification requirement will remain in effect until such time that the Washington Department of Fish and Wildlife develops site-specific timing windows for herbicide application. When and if Fish and Wildlife has approved site-specific timing windows, they may be used in lieu of the notification requirement.

Our question is whether the court decision of Washington Toxics Coalition vs. EPA and the list of 35 pesticides including 2,4-D (applied terrestrially) has an impact on our aquatic permitting program? Their case was concerned with terrestrially-applied pesticides that are incidentally washing into our streams and rivers after rainfall. In our situation, an aquatic labeled 2,4-D is deliberately applied to a lake for aquatic weed control.

We have already been getting inquiries at Ecology about whether

we will continue to issue permit coverage for aquatic 2,4-D use.

Thank you.

Kathleen - I assume that you will attach the court decision to this for Ron's review.

EXHIBIT B



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

May 21, 2004

Via E-Mail, Followed by U.S. Mail

Ron Lavigne
Assistant Attorney General
Office of the Attorney General
Ecology Division
2425 Bristol Court S.W., 2nd Floor
P.O. Box 40117
Olympia, WA 98504-0117

Re: *Washington Toxics Coalition v. EPA*,
No. C01-0132C; Order Dated January 22, 2004

Dear Ron:

We understand that the Washington Department of Ecology has recently issued a permit to the Department of Agriculture that would allow aquatic applications of 2,4-D to Lake Washington, and possibly other surface waters, for noxious weed control. Such applications are prohibited by Judge Coughenour's Order, referenced above, in Washington Toxics Coalition v. EPA, for two reasons: 1) the Order does not allow aquatic applications; and 2) to the extent private landowners are acting under the guise of the Department of Agriculture's permit, such applications are not "administered by public entities," as required by the Order. Order at 9.

As attorneys for plaintiffs in that case, we were involved in negotiating, drafting, and presenting to the Court the language included in its January 22, 2004, Order. We thought it would be helpful for Ecology to understand the context in which the Order was entered so that it may revisit its decision to issue its permit or to allow these aquatic applications.

The active ingredients covered by this litigation were selected because of their toxicity to threatened and endangered salmonids or their detection by the U.S. Geological Survey in surface waters of the Pacific Northwest. 2,4-D, the active ingredient at issue here, has been detected in salmon watersheds throughout the Northwest, including King County, at or above established levels for aquatic life. In one USGS study, 2,4-D was also detected 100 percent of the time in

urban streams in Puget Sound. The frequency of detections of 2,4-D in our region, together with its being found at or above aquatic life criteria, presents a hazard to listed salmonids.

The purpose of the litigation is to have EPA comply with Section 7 of the Endangered Species Act by carrying out its mandatory duty to consult with the National Marine Fisheries Service (NMFS) on the effects of these active ingredients, including 2,4-D, on threatened and endangered salmonids. Because EPA's consultation process is so lengthy, and because of the current harm to salmonids caused by the presence of these active ingredients in water, the Court imposed injunctive relief to minimize harm pending EPA's compliance with the ESA.

The Order authorizing injunctive relief is premised on the use of buffers, 20 feet for ground applications, and 100 feet for aerial applications, to keep these active ingredients out of "Salmon Supporting Waters" (defined to include Lake Washington). Order at 3-4. The Order includes several buffer variations for certain ingredients or application methods, and two types of exemptions: 1) for public health vector control programs "administered by public entities," for which no buffers are required; and 2) for noxious weed programs "administered by public entities," for which NMFS safeguards, including buffers, apply. Order at 9, III.D.2.

The "Noxious Weed Programs" discussed in the Order at pages 9-10 requires safeguards that NMFS "routinely requires." The record evidence submitted in the case includes biological opinions from NMFS on the use of herbicides, including 2,4-D, for noxious weed control. In none of the biological opinions does NMFS authorize the application of 2,4-D (or any other active ingredient, for that matter) to salmon waters. Rather, for pesticides that EPA has registered under FIFRA for aquatic application (such as 2,4-D), NMFS has allowed terrestrial applications within 15 feet of salmon waters by methods designed to reduce drift and run-off, such as "spot spraying, wicking, dipping, painting, and injecting." See, e.g., Endangered Species Act Section 7 Consultation Biological Opinion: Effects of 2002 Herbicide Treatment of Noxious Weeds on Lands Administered by the Salmon-Challis National Forest, National Marine Fisheries Service, September 16, 2002, at 6, Table 3. For this reason, the language of the injunction that "Only those Pesticides registered by EPA under [FIFRA] for aquatic application can be used within 15 feet of Salmon Supporting Waters," Order at 9, III.D.2.d, refers to the NMFS safeguard that the amine formulation of 2,4-D may be used within a 15-foot buffer of salmon waters, but may not be applied directly to water.

It is apparent that aquatic applications are not authorized by the Order, even for the category of active ingredients otherwise registered by EPA under FIFRA for aquatic applications, when Paragraph III.D.2.d is read in conjunction with the rest of the Order, including the paragraph that immediately follows it. Paragraph III.D.2.e provides that "Pesticides cannot be used when precipitation is occurring or is forecast to occur within 24 hours." The reason that NMFS adopted this safeguard in its biological opinions, and why it is repeated in the Order here, is to prevent the contamination of surface water through run-off

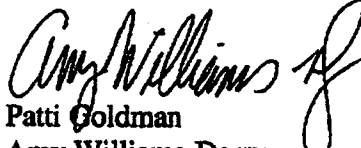
Ron Lavigne
May 21, 2004
Page 3

caused by precipitation. Obviously, there would be no need for such a generic safeguard if aquatic applications were allowed.

Second, only those noxious weed programs that are "administered by public entities" are exempt from the Order's standard buffers. Anticipated applications of 2,4-D to Lake Washington, paid for by private landowners who contract independently with herbicide applicators, do not fit within this category. Instead, each private landowner would be engaging in independent, nongovernmental spraying activities. Although Ecology has issued a permit to the Department of Agriculture, the independent actions of private landowners, even under the guise of this permit issuance, does not constitute a program "administered by a public entity." We understand that the herbicide applicators are independent contractors with no agency or employment relationship with the State of Washington. We further understand that these herbicide applicators must agree to indemnify, defend, and hold harmless the State of Washington from all civil and criminal liability, including liability under the Endangered Species Act. These facts do not translate into a noxious weed program "administered by a public entity," as the Order requires.

We would welcome the opportunity to discuss this matter with you further or to answer any questions you may have.

Sincerely,



Patti Goldman
Amy Williams-Derry

cc: Wayne Hettenbach, counsel for EPA

EXHIBIT C



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
JUNEAU, ALASKA NEW ORLEANS, LOUISIANA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

July 1, 2004

Via Facsimile, Followed by U.S. Mail

Wayne D. Hettenbach
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

Re: *Washington Toxics Coalition v. EPA*
Case No. C01-0132C

Dear Wayne:

I am writing this letter to ask Environmental Protection Agency ("EPA") to intervene in a controversy that has arisen in Washington State over the scope of the buffers and the noxious weed exemption in the Court's January 22, 2004 Order. The Washington Department of Ecology has issued a permit that would allow aquatic applications of 2,4-D, one of the pesticides subject to the Order's buffers. We objected to this permit in a letter dated May 21, 2002, which we also sent to you and which is attached.

It appears that the Department of Ecology is intending to retain the permit, which would authorize aquatic applications this month. As stated in our May 21, 2002 letter, we believe the permit is in violation of the January 22, 2004 Order. We ask that EPA intervene in this dispute and direct the Department of Ecology to rescind the permit. If we do not obtain satisfactory resolution of this matter by July 12, 2004, we will seriously consider asking Judge Coughenour to clarify his Order in this regard.

Sincerely,

Patti Goldman
Attorney for Washington Toxics Coalition et al.

Enclosures

cc: Ron Lavigne